IAC-AH-VP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/16338/2014
IA/27972/2014
IA/27973/2014
IA/27975/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 February 2015	**On 16 March 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

JI
ZI
UI
SI
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr G Hopewell, Counsel, Duncan Lewis & Co Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify

the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

1. The appellants are all citizens Bangladesh. The appellant JI's date of birth is 30 December 1980 and she is married to SI whose date of birth is 15 June 1979. They have two children, Master ZI whose date of birth is 1 December 2005 and a daughter Miss UI whose date of birth is 9 July 2012. They made an application on 21 November 2012 for leave to remain in the United Kingdom. The application was refused by the Secretary of State in a decision of 20 March 2014 under Appendix FM and paragraph 276ADE. The Secretary of State considered Section 55 of the Borders, Citizenship and Immigration Act 2009.

2. The appellants appealed against the decision of the Secretary of State and their appeals were dismissed by Judge O R Williams in a decision that was promulgated on 15 September 2014 following a hearing on 3 September 2014.

The Immigration History of the Appellants

3. The immigration history of the appellants is set out in the decision letter of the Secretary of State. SI applied for entry clearance as a working holidaymaker on 20 January 2005. This application was refused. Both he and his wife JI then made another application and they entered the UK on 2 August 2006 having been granted entry clearance as working holidaymakers. Their visas were valid from 18 April 2006 to 18 April 2008. Their eldest child ZI entered the UK on 2 August 2006 having been granted entry clearance to accompany his parents. His visa was from 16 May 2006 to 16 May 2008.

4. SI on 27 March 2008 applied for leave to remain in the UK as a highly skilled migrant with ZI and JI as dependants. This application was rejected on 10 April 2008. The family left the UK and returned to Bangladesh and re-entered the UK on 21 May 2008. SI was granted entry clearance as a highly skilled migrant from 11 May 2008 to 11 May 2010 and his wife and their son were granted entry clearance as dependants.

5. On 15 March 2010 SI applied to vary his leave as a Tier 1 Highly Skilled (General) Migrant. This application was rejected on 19 March 2010. On 24 March 2010 he made an application on the same basis which was refused on 24 April 2010 with no right of appeal. On 11 May 2010 he applied for leave to remain on the same basis and this was refused again on 23 November 2010 with a right of appeal. He lodged an appeal on 15 December 2010. His appeal was dismissed on 29 June 2011 and at this

stage all appeal rights were exhausted. JI applied for leave to remain on 21 November 2012 under Article 8 of the 1950 Convention with her husband and family. This application was refused with no right of appeal. Following an application for judicial review the Secretary of State agreed to reconsider the application which resulted in the decision of 20 March 2014.

The Decision of the First-tier Tribunal

6. The Judge made the following findings:-

> "8. I am satisfied that it would be reasonable for the appellant [ZI] to return to Bangladesh with his family. I reach that conclusion for the following reasons.
>
> 9. Firstly, Master [ZI] arrived in the United Kingdom when 8 months old on 2 August 2006. At that time, at the date of the application (on 15/11/12), the appellant had not been in the United Kingdom for seven years.
>
> 10. Even if the appellant met EX.1(c) it would be reasonable for the child to return to Bangladesh. I reach that conclusion as the family have retained ties to Bangladesh. I heard evidence that both have relatives in Bangladesh: [JI] has parents and other siblings in Bangladesh with whom she maintains contact and [SI] has one sister in Bangladesh; with both returning to Bangladesh in April/May 2008. Both [SI and JI} speak Bengali at home to each other; [ZI] can follow the conversation and reply in English. [SI] conceded that if his son went to school in Bangladesh he would be able to pick up the language.
>
> 11. I am satisfied that a return to Bangladesh would be reasonable. Both have family members living in Bangladesh and it would be reasonable to expect a level of support from family members. [JI] was educated at university level in Bangladesh and her husband also has a good education/work history – I am satisfied that both could get jobs and hence support the children. They have a part equity purchase of their flat in the United Kingdom and they/an agent on their behalf would be able to sell this in order to raise money to return to Bangladesh with.
>
> 12. All the appellants are fit and healthy and there should be no reason why they could not re-establish themselves in, say, Dhaka, notwithstanding the length of time they have spent in the United Kingdom. They will be returning to Bangladesh as a family unit and they would be able to support their young children as they become used to living in Bangladesh and enjoying the full rights a (sic) citizens of Bangladesh. [ZI] has benefited from his education in the United Kingdom. He is just entering year 4 in primary school. He is still very young and I am satisfied that he would be able to adapt to life in Bangladesh and to a new school with the help of his loving family.
>
> ...

16. I am satisfied that both [SI] and [JI] had valid leave until 11/05/10 – that was accepted by both representatives. From that point on matters became increasingly precarious for the family. I have had regard to the determination of Immigration Judge Beg dated 10/02/11 in which [SI] appealed a decision of the respondent dated 30/11/10 refusing his application as a Tier 1 (General) Migrant under the points-based system upon which his family were dependants. [SI] submitted a letter purporting to be from Huawei Technologies. Immigration Judge Beg found that the appellant had never worked for Huawei Technologies and the letter was not genuine. During the Tribunal [SI] admitted that he had also submitted false HSBC statements with his application dated 05/04/10. The appellant was found to have acted dishonestly and that his credibility was significantly damaged.

17. Immigration Judge Beg's determination was subject to an appeal to the Upper Tribunal and subject to judicial review. However, bearing in mind the appellant's dishonesty, it cannot have come as any surprise to the appellant that the appeal to the Upper Tribunal was refused on 20/06/11 and the JR refused on 20/03/12 – the appellants learning of this failure in September 2012. Indeed, [SI] must have known that his immigration status was precarious prior to Immigration Judge Beg's decision. [SI] had a valid visa up until 11/05/10. On or about March/May 2010 he made the fatal decision to submit the application accompanied by false documents, which were eventually dealt with by the Immigration Judge. I am satisfied that ever since the date of application in March/May 2010 (and then leading up to the dismissal of the appeal by Immigration Judge Beg) the appellants would have always known that their immigration position was precarious since they were relying on false documentation.

18. But despite the couple's precarious position they forged ahead with their private and family life in the United Kingdom with [UI] born on 09/07/12 and [ZI] starting school. It would have been sensible if they had returned to Bangladesh in 2010 when they knew they could not meet the Rules rather than acting dishonestly. As it is, for the reasons given, it would be reasonable for them to return now.

19. Whilst it is incumbent to consider the child's interest (sic) I am satisfied that those interests are covered by the Rules and Regulations. Section 55 is not a 'trump card' to be played whenever the interests of a child arise. Based on the evidence presented I am unable to find good arguable grounds or compelling circumstances not sufficiently recognised by Appendix FM, paragraph EX.1.

20. In the circumstances I find there was no basis to consider this appeal under Article 8 ECHR.

21. Even if there had been good reason I am satisfied that I would have to have regard to Section 117B as inserted into the 2002 Act by Section 19 of the Immigration Act 2014. Relevant to any assessments on proportionality would have been Section 117B(2), (3), (4), (5) and (6).

22. While Section 117B(6) recognises a genuine and subsisting relationship with a qualifying child and the appellant's son has now lived here for seven years, but for the reasons given above it would be reasonable to expect the child to leave the United Kingdom.

23. The remaining Sections of 117B assist the appellants – they are financially self-supporting (albeit they are currently unable to work due to their immigration status and so have debts) and there is evidence before me that they speak English. However, notwithstanding the assistance of Section 117B I take note of the fact that the (sic) little weight should be given to a private life (such as getting a job and developing English skills) which is formed when a person's immigration status is precarious – as detailed above.

24. I am satisfied that even if Article 8 had been engaged it would not have been disproportionate to remove the appellants as a family unit (which would have safeguarded the young children's welfare when considered as a primary consideration, Section 55 of the Border, Citizenship and Nationality Act 2001) (sic) because of what the House of Lords in **Huang [2007] UKHL 11** called,

> 'The general administrative desirability of applying known Rules of a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another'; and
>
> 'The damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctionary'".

The Grounds of Appeal

7. The grounds of appeal argue that the judge should have given full consideration of what would be in the children's best interests. The Immigration Rules do not replace Section 55 and a failure to assess the best interests is an error of law.

8. The second ground of appeal argues that the judge's assessment of Appendix FM EX.1 of the Immigration Rules is unsatisfactory. The judge failed to give adequate reasons for deciding that it would be reasonable for ZI to return to Bangladesh with his family. The judge failed to take into account the impact of the decision on ZI. There is no consideration of the fact that ZI is unable to speak Bengali. The appellant's bundle contained over 40 pages of evidence relating to ZI's education including school reports and certificates and the judge failed to take these into consideration in assessing whether or not it would be reasonable for ZI to return to Bangladesh.

9. The third ground of appeal argues that the judge erred in concluding that there was no basis to consider the appeal under Article 8. A full and thorough consideration of Article 8 should have been carried out. The judge should have given full consideration to the appellants' private life

which was developed during a time when the appellant and her family's status was not precarious. The judge failed to carry out an adequate proportionality assessment.

10. At the hearing before me Mr Hopewell submitted a skeleton argument of 25 February 2015. It was argued that the judge bluntly rules out considering Article 8 (see [20]) and his subsequent assessment of it is an afterthought. The judge failed to set out reasons for concluding that the decision to remove the appellants is proportionate. The appellants are entitled to have detailed the basis of such a decision.

11. There is limited consideration of ZI and no or very limited reference to UI. In any event neither child is considered by the judge properly or at all when considering Article 8.

12. Both representatives made oral submissions. Mr Hopewell's were in the context of his skeleton argument and Mr Walker submitted that there was no error of law.

The Evidence before the First-tier Tribunal in relation to the Children

13. There was a witness statement from JI of 26 August 2014 in which the following is stated:-

> "12. My son started primary school in September 2010. He has found many friends there. My son has only been to Bangladesh twice in his life. He can understand Bengali but never uses it. He has always considered London his home and does not want to go back to Bangladesh. I think he is afraid he will have to go back and live there. He wishes to stay in the UK with his friends and keep playing football. He also attends homework, library and arts and crafts clubs.
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> …
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> 20. My son will be going into year 4 in September. My son loves going to school, he has fantastic school reports and is achieving well. He has had a hundred percent attendance for the last school year, something he is proud of. My son has also started afterschool swimming and football sessions which he enjoys. Our son has started learning to play tennis at our local leisure centre and continues to play football. My son takes part in community activities and will be attending the summer activity programme but he is looking forward as he enjoyed the football programme last year.
>
> 21. My son has made friends at school and their parents have now become friends of ours. I take my son to meet friends from his school regularly. We all enjoy this.
>
> 22. I take my daughter to Marner Children's Centre in Bromley by Bow three times a week to attend mother and baby sessions. These are stay and play sessions where she interacts with other children. We

both really enjoy this. In June this year I started a cook for life course for five weeks which was about healthy cooking and eating.

23. The life we have here cannot be replicated anywhere else. My son will suffer the most as he will be deprived from education and all his friends. However, my son and I will also struggle greatly. I feel that I am part of the community here. I have created an environment for myself, I have a home and a career. It will be unfair to my entire family to be asked to leave all this behind. If we were to return to Bangladesh, I cannot see how we could have all of this again. Therefore, I ask that my family and I are allowed to stay in the UK and enjoy our private and family lives together.

...

27. In relation to the comment about my son being able to adapt to the education system in Bangladesh this is not going to be easy for him. My son is not confident in Bengali, he does not know how to read in Bengali and struggles to communicate unless it's very simple. He would not be able to adapt to being taught in Bengali. We have brought our son up speaking English as we intended him to remain in the United Kingdom".

14. SI relied on the statement of evidence of 26 August 2011 and in relation to his children his evidence contained in his statement reads as follows:-

"5. ... My wife and I knew we would be able to give our children a better life and education in the United Kingdom. We now realise that we made the right decision as we can see how our son [SI] loves to be here, he is always in the top group in his classes. He enjoys extracurricular activities, summer reading challenges, swimming; he is also enrolled to football and tennis lessons at the Mile End Leisure Centre. This summer he was also enrolled for art burst where he learned art and played the character Charlie for the 'Charlie and the Chocolate Factory' drama. He would have missed all above if we were to live in Bangladesh.

...

11. My son started primary school in September 2010. He has found many friends there. My son has only been to Bangladesh twice in his life. He can understand Bengali but never uses it. He has always considered London his home and does not want to go back to Bangladesh. I think he is afraid he will have to go back and live there. He wishes to stay in the UK with his friends and keep playing football. He also attends homework, library and arts and crafts clubs."

15. In the grounds of appeal before the First-tier Tribunal it was asserted that ZI's first language is English and he has not returned to Bangladesh since he left. He is doing well in school and has excellent attendance and that to remove him from the UK is not in his best interests and not in accordance with Section 55 of the 2009 Act. In relation to ZI there were

documents submitted relating to his attendance and progress at school. The evidence all suggested that he was doing very well.

16. The skeleton argument before the First-tier Tribunal maintained that the appellants left the UK on 19 April 2008 and returned on 17 May 2008. This was a holiday. It was argued that ZI has spent all but the first eight months of his life in the United Kingdom and his first language is English. He cannot read or write Bengali and he is only able to communicate using very basic sentences in Bengali. He would encounter a number of problems and a serious language barrier. He is currently flourishing in all areas of his education. Should he be forced to leave his school, friends and afterschool clubs and relocate this would amount to a serious breach of his rights under Article 8. JI and SI would be required to sell their property and start their careers from the beginning leaving their friends and start from scratch in Bangladesh which would not be justified.

17. It was submitted in the skeleton argument that the best interests of the two children should be the primary consideration in this case and that it would not be reasonable to expect the appellant and her children to relocate to Bangladesh.

Conclusions

18. I have considered [19] of the determination and although it could have been expressed better, it does not cause me concern. The judge considered at some length the best interests of the children and made a finding that it would be in their best interests to return to Bangladesh with their parents. I refer specifically to [8]–[12] and [24], which should be read together with [19]. The judge acknowledges that ZI has been here for seven years and the significance of that was clear to him. The judge was of the view that it would be in the children's best interests to return to Bangladesh with their parents as a family unit (see [24]). This decision was entirely open to him on the evidence before him. It is consistent with jurisprudence. I refer specifically to Azimi-Moayad and Ors (decisions affecting children; onward appeals) [2013] UKUT 197 where the Tribunal noted that seven years from the age of four is likely to be more significant to a child that the first seven years of life. Although there has been lengthy residence in this case, there was, before the judge, no evidence of the development of significant social cultural or educational ties here. ZI is still young child and the starting point is that his best interests would be to be with both his parents who are being removed. The judge made lawful and sustainable findings at [9] to [12] in relation to the children. There is a difference between what is reasonable (in the context of the rules) and what is in a child's best interests, but there is an overlap of the relevant considerations and it was not necessary for the judge to repeat findings that he had already made in respect of reasonableness when considering best interests.

19. There is no merit in the ground that the judge did not properly consider reasonableness. He considered the position of ZI at length and made a lawfully sustainable finding that it would be reasonable for him to leave. The judge made sustainable findings in relation to language and he took into account the evidence from the school. There was nothing significant in the evidence relating to ZI that the judge did not take into account.

20. The judge went onto consider Article 8 outside the rules and properly applied section 117B of the 2002 Act. The grounds do not disclose any material error in the balancing exercise conducted. The strength of the appeal is ZI. The adult appellants became appeal rights exhausted on 29 June 2011. There has been a finding by the FtT that the appellant, SI, submitted false documents in support of an application. The judge found that they have family in Bangladesh and that they are both employable. The grounds maintain that there an error because the article 8 assessment was an "afterthought", but they fail to identify any material error in the assessment.

21. The assessment of ZI's best interests is crucial to the proportionality exercise. If the judge erred (either by not making an assessment or in not doing it properly) then it follows that the decision is flawed and should be set aside and remade. For the reasons that I have given the judge properly considered the children's best interests. On the evidence before the FtT I would have reached the same conclusion as the FtT. The judge did not conduct a discrete assessment of UI's best interests. This is not a material error. There was very little evidence about her best interests and she is very young. It is unarguable that a discrete assessment of her best interests would have resulted in a different conclusion.

22. There is no material error of law and the decision of the judge to dismiss the appeal is maintained.

23. I have made an anonymity direction to protect the identity of the children.

Signed Joanna McWilliam Date 12 March 2015

Deputy Upper Tribunal Judge McWilliam